

PP

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v.

ROSMAN ISMAIL

HIGH COURT, SABAH AND SARAWAK

b

IAN HC CHIN J

[CRIMINAL TRIAL: K47-01-2000]

4 JULY 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Analysis of dangerous drug - Whether samples tested by chemist represented at least 10% of total - Dangerous Drugs Act 1952, s. 37(j)*

c

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Presumption of trafficking - Whether could not be invoked due to failure to prove possession - Dangerous Drugs Act 1952, s. 37(da)(xvi)*

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The accused was charged for trafficking in methamphetamine, which was an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the Act. The accused had been arrested after he was found with an envelope, which among other things, contained two packets of a white crystalline substance which the chemist, after testing, said was methamphetamine. The defence however contended that the requirement under s. 37(j) of the Act had not been satisfied as the chemist failed to test a minimum of 10% of the gross weight of the substance. The defence also averred that the accused did not know that the envelope contained methamphetamine.

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Held:

[1] Section 37(j) of the Act was interpreted by the Court of Appeal in *Loo Kia Meng v. PP* to mean that "it was incumbent for the chemist to test a minimum of 10% of the drug". In this instance however, the samples tested by the chemist were inadequate as they were far less than 10% of the drug; therefore, s. 37(j) of the Act was not satisfied and there was a reasonable doubt in the case. (pp 142g & 143b)

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[2] On the facts, the circumstances referred to by the learned deputy registrar could not lead to the irresistible inference that the accused knew that there was methamphetamine in the envelope. The prosecution had therefore failed to prove possession which meant that the presumption of trafficking under s. 37(da)(xvi) of the Act could not be invoked. Moreover, a case for

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- a* possession instead of trafficking had also not been made out since possession required knowledge of the drugs which was absent in this case. (pp 144 c-d)
- [Accused acquitted.]*
- b* **Case(s) referred to:**
Au Ah Lin v. PP [1963] MLJ 365 (**not foll**)
Leong Bon Huat v. PP [1993] 3 MLJ 11 (**foll**)
Loo Kia Meng v. PP [2000] 3 CLJ 653 (**foll**)
Muhammed Hassan v. PP [1998] 2 CLJ 170 (**foll**)
Mat Repin Mamat v. PP [1994] SLR 663 (**not foll**)
- c* *PP v. Alex Muharram & Anor* (High Court of the Federal Territory of Labuan, CT No: 47-02 and 47-03 of 1979 (unreported)) (**refd**)
PP v. Seow Wei Hoong (Kota Kinabalu High Court CT K47-02-2001(unreported)) (**foll**)
- d* **Legislation referred to:**
Dangerous Drugs Act 1952, s. 37(da)(xvi), (j)
- Other source(s) referred to:**
United Nations - Recommended Methods For Testing Amphetamine and Methamphetamine, p 10
- e* *For the prosecution - Wan Abdul Razak Wan Hussin, DPP*
For the accused - VK Liew; M/s VK Liew & Co
- Reported by Suresh Nathan*

JUDGMENT

- f* **Ian HC Chin J:**
Rosman Ismail (“the accused”) was arrested on 8 April 2000 at the Labuan Ferry Terminal after he was found with an envelope which, among other things, contained two packets with a white crystalline substance inside which the chemist said was methamphetamine. The charge against him as a result of the
- g* discovery of the substance was this:
- That you, on the 8th April, 2000, at around 1.20 p.m. at Labuan Ferry Terminal, in the Federal Territory of Labuan, Malaysia, did on your own behalf traffic in a dangerous drug to wit 70.23 grammes of Methamphetamine and that you have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act, 1952 (Act 234) and punishable under Section 39B(2) of the same Act.
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- On that day a trio of police officers attach to the narcotic branch, namely, Corporal Idris Bin Ahmad, Lance Corporal Jonathan Ak Amat and Lance
- i* Corporal Maradam bin Andang, were keeping watch on passengers disembarking

from a boat that had arrived from Kota Kinabalu. Officer Jonathan stopped the accused and asked for his travel documents and the accused showed him a photostated copy of an identity card. As the accused looked suspicious and frightened, Jonathan decided to search the accused. He recovered an envelope from the pocket of the jeans the accused was wearing. Inside the envelope were two plastic packets containing a white crystalline substance and some innocuous cotton pads. Mr VK Liew, learned counsel for the accused, contended that the envelope was sealed with its own adhesive and this, learned counsel contended, was confirmed by officer Idris who had said: "It was Jonathan who opened the envelope". Jonathan had said that the envelope was already opened when he recovered it from the pocket of the accused. This contention was important to the defence submission that the accused could not possibly know what was inside the envelope as it was sealed before officer Jonathan opened it. That statement of officer Idris must be read in the proper context. It must not be forgotten that an envelope has a mouth and a lip and the lip may still be closed though not glued. Therefore, when officer said the envelope was opened by officer Jonathan it was meant to convey the meaning that the lip was opened. Furthermore, it was officer Jonathan who removed the envelope from the accused and he should be in a better position to say one way or the other. There is nothing at this stage of the case to suggest that his evidence is inherently incredible as to entitle the court to conclude that he should not be believed.

The envelope and contents and the accused were then brought to the police station where the investigation officer Chief Inspector Nik Mohd Zuhry was informed of the arrest and seizure. A police report was then made by officer Idris relating to the arrest and the recovery of the envelope and its contents. Issue was taken by the defence that the police report talks of the recovery of a "sampul surat" while the chemist Shaari bin Desa when referring to the envelope that was handed to him described it as "sampul kertas" and this gives rise, according to the defence, to a doubt as to the proper custody of the envelope as the envelope that was sent to the chemist for examination may not be the same one as the one recovered from the accused. Those terms in Malay are just different way of describing the same thing and it should not give rise to any doubt. In any event officer Nik had marked the envelope recovered from the accused with the alphabet "A" which the chemist referred to when describing the envelope which would dispel any doubt there may be as to the description being in respect of the same envelope.

Though no issue was taken I am of the view that officer Nik together with officer Jonathan, officer Idris, the chemist and the exhibit storekeeper officer Mohad Nazib has properly accounted for the custody of the exhibits when they

a were at various times under their possession from the time they were recovered from the accused until the time they were tendered in court on July 2.

b The chemist when the exhibits were in his custody removed the white crystalline substance from the two packets found inside the envelope and found their respective weight to be 45.7050 gm and 46.7218 gm, thus a combined weight of 92.4268 gm. He examined the substance and found them to be of the same type. He then used a blender to mix the substance which produced a homogenised mass, that is every part is the same as the others. He then conducted the colour test on random and representative samples and the test involved using three methods which results made him conclude that the substance contain methamphetamine hydrochloride. Another test employed by him to determine the presence of methamphetamine hydrochloride was by using the gas chromatography/mass spectrometry and the result was again positive. For these tests he used 1.36 gms of samples taken from the homogenised mass. For the final test which was to determine the amount of methamphetamine he employed a gas chromatography-flame ionic detector and used 21 replicate, random and representative samples weighing a total of 0.26 gm. From this test he concluded that the amount of methamphetamine in the substance is 77.01% and allowing for a margin of error of 1.01% is 70.23 gm. Though it was possible to take 10% of the gross weight for his examination he did not do so. This led the defence to contend that the requirement of s. 37(j) of the Dangerous Drugs Act 1952 had not been satisfied. That provision says:

e (j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

h This section was interpreted by the Court of Appeal in *Loo Kia Meng v. PP* [2000] 3 CLJ 653 to mean that “it is incumbent for the chemist to test a minimum of 10% of the drug.” The learned deputy public prosecutor Wan Abdul Razak said that the case was upheld by the Federal Court recently but that he does not have the grounds of the decision of the Federal Court and therefore is not able to say whether the decision on s. 37(j) was upheld as the Court of Appeal also overturned the decision of the High Court on the point that a presumption was heaped upon another decision which was not allowed.

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The learned deputy had urged the court to follow *Au Ah Lin v. PP* [1963] MLJ 365 which consider a provision of the Excise Act 1961 which has a provision which is in terms similar to s. 37(j) and there the Federal Court held that the term 10% refers not to the contents but to the packages. But I have to follow *Loo Kia Meng* which was on the very provision which falls to be considered in this case and I cannot defer to the Singapore case of *Mat Repin bin Mamat v. PP* [1994] SLR 663 which decides otherwise but in respect of a Singapore legislation. Therefore I am left with no choice but to conclude that as the chemist did not conduct the tests on at least 10% of the homogenised mass, it did not satisfy s. 37(j) and therefore I am left with a reasonable doubt in the case. I would add that even without *Loo Kia Meng* I would as I have done previously in the unreported case of *PP v. Seow Wei Hoong* (Kota Kinabalu High Court CT K47-02-2001, 20 May 2002) and following *PP v. Alex Muharram & Anor* (High Court of the Federal Territory of Labuan, CT No. 47-02 and 47-03 of 1979) hold that the amount of samples of only 0.26 gm is not an adequate amount as laid down by *Leong Bon Huat v. PP* [1993] 3 MLJ 11. In my view an amount of at least 10% is required to reduce the risk of the larger unexamined mass of the substance containing a greater amount of impurities and thus reduce the amount or quantity of methamphetamine in the substance and giving rise to the possibility that the amount may be less than the 50 gms that attracts the death penalty.

The next question is whether the accused knew that the envelope contained methamphetamine. Unless he had the knowledge he cannot be said to be in possession of the drug in the envelope (*Loo Kia Meng v. PP* [2000] 3 CLJ 653; *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170). Since such knowledge can only be inferred from the surrounding circumstances it remains to be examined what the circumstances are in this case that the court was urged to infer the knowledge on the part of the accused that the envelope contained methamphetamine. The prosecution had relied on the fact that the accused looked suspicious and frightened when he handed over a photocopy of an identity card to officer Jonathan from which to infer knowledge. The defence on the other hand argued that the accused could be frightened because he was not carrying the original identity card. In my view, knowledge of a drug and in this case methamphetamine must depend firstly on whether it is easily discernible that a particular substance is methamphetamine. Methamphetamine it must be remembered can take several forms, like in the shape of capsules or tablets or as a powder or gummy substance (*United Nations - Recommended Methods For Testing Amphetamine and Methamphetamine*, p. 10). That being the case and if one encounters methamphetamine for the first time without prior knowledge as to what it looks like, one would definitely not know whether the substance or the capsule or tablet is methamphetamine. This is understandable as even a chemist needs multiples tests and different equipment before he can

- a* conclude that something is methamphetamine. Therefore, a prior knowledge of methamphetamine is necessary before one can identify a substance as being methamphetamine. That knowledge may come from being told that it is methamphetamine when one is given the substance. In this case there is none of that. I do not find it possible to infer that it must be that the accused knew
- b* that the envelope contained methamphetamine, it being, it must be remembered, so difficult to discern what is methamphetamine, just because he looked suspicious or frightened. The fright could be his first encounter with the police. It could be his fear of being detained for not having the original identity card after reading the untoward incidents that happened in police lock-ups. As for
- c* being suspicious there was no elaboration as to how the accused behaved which justify the suspicious look. Therefore, the circumstances referred to by the learned deputy cannot lead to the irresistible inference that the accused knew there was methamphetamine in the envelope. The prosecution had therefore failed to prove that the accused knew there was methamphetamine in the envelope and therefore failed to prove possession. Consequently, the presumption of
- d* trafficking under s. 37(da)(xvi) cannot be invoked.

- In the premises, the prosecution has failed to establish a *prima facie* case. The accused is therefore discharged and acquitted without his defence being called. I am also of the view that a case for possession instead of trafficking has also
- e* not been made out since possession requires knowledge of the drug which is absent in this case. I feel that the prosecution has been given a near impossible task of establishing knowledge on the part of an accused person that he knew what drug he was carrying. I have no choice but to follow the decisions of the higher courts. The sooner the law is amended to redress the problem the
- f* better it is. There is also the urgent need to address the problem of the quantity of samples to be taken for tests and one would have thought that it would be wise to immediately instruct the chemist to conduct tests on at least 10% of the substance suspected of containing methamphetamine for future cases in order to avoid the pitfalls that the previous cases and now this one had suffered.

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